

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TROY CASTILLO,

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Plaintiff,

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Case No.: 2:14-cv-0332-GMN-PAL

vs.

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ORDERKEVIN INGRAM; *et al.*

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Defendants.

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Pending before the Court is the Motion to Dismiss, (ECF No. 21), filed by Defendants Kevin Ingram, David Spencer, Mark Zane, James Nadeau, James Colbert and Robert Uithoven in their official capacities. Plaintiff Troy Castillo filed a Response, (ECF No. 23), to which Defendants replied, (ECF No. 24).

I. BACKGROUND

This case centers upon constitutional challenges to several provisions of Nevada's licensing scheme for private investigators. (Compl., ECF No. 1). Plaintiff Troy Castillo is a resident of California and a twenty-nine year veteran of the Palm Springs Police Department who wishes to work as a private investigator in Nevada. (*Id.* at 5:22-25). Plaintiff was issued a Nevada private investigator's license in 2012, which was held in abeyance until his retirement as a police officer in 2013. (*Id.* at 5:15-17). However, due to Plaintiff's concerns regarding the statutory provisions at issue in this case, he has ceased his business operations in Nevada. (*Id.* at 5:18-20). Plaintiff currently works as a private investigator in California, and does not maintain a business office or own a residence in Nevada. (*Id.* at 5:15-20).

1 Plaintiff challenges three provisions of Nevada law which set forth requirements
2 pertaining to private investigators in Nevada. The first of these is Nev. Rev. Stat. § 648.100(2),
3 which provides that any applicant for a Nevada private investigator's license must undergo a
4 background and character investigation. Pursuant to this provision, out-of-state applicants must
5 pay for the entire cost of the investigation, while Nevada residents are only liable for up to
6 \$1,500 of the investigation's cost. Nev. Rev. Stat. § 648.100(2). Plaintiff argues that this
7 provision discriminates against out-of-state residents without legal justification, and therefore
8 violates the Commerce Clause, the Privileges and Immunities Clause of Article IV, and the
9 Equal Protection Clause of the Fourteenth Amendment. (Compl. 10:5-11:12).

10 The second provision at issue in this case is Nev. Rev. Stat. § 648.148, which requires
11 that licensees "[m]aintain a principal place of business in [Nevada]." Plaintiff argues that this
12 provision discriminates against out-of-state private investigators by requiring that they incur the
13 substantial cost of maintaining a business office in Nevada, while allowing in-state private
14 investigators to avoid this cost by designating their residence as their principal place of
15 business. (Compl. 7:22-8:4). Based on this alleged competitive advantage to in-state residents,
16 Plaintiff argues that this provision violates the Commerce Clause, the Privileges and
17 Immunities Clause of Article IV, and the Due Process Clause of the Fourteenth Amendment.
18 (*Id.* at 7:9-15).

19 Additionally, Plaintiff challenges Nev. Rev. Stat. § 648.060, which provides that
20 individuals may not work as private investigators in Nevada unless they are licensed by the
21 state. Plaintiff claims that the requirement that he obtain a license infringes his rights under the
22 Free Speech Clause and is unrelated to public health, safety, or welfare. (Compl. 10:24-11:5).
23 Plaintiff also asserts that the statute's definition of a "private investigator" is facially overbroad,
24 which infringes upon his rights under the Free Speech Clause. (*Id.* at 11:20-12:17).

25 In the instant Motion, Defendants assert, *inter alia*, that Plaintiff lacks standing to raise

1 the constitutional challenges at the center of this case and that the issues set forth in the
2 Complaint are not ripe for the Court's review. Therefore, Defendants request that the Court
3 dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1).

4 **II. LEGAL STANDARD**

5 Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of an action for lack of
6 subject matter jurisdiction. "A party invoking the federal court's jurisdiction has the burden of
7 proving the actual existence of subject matter jurisdiction." *Thompson v. McCombe*, 99 F.3d
8 352, 353 (9th Cir. 1996). However, when ruling on a motion to dismiss pursuant to Rule
9 12(b)(1), the Court must accept all factual allegations in a complaint as true. *Carson Harbor*
10 *Vill., Ltd. v. City of Carson*, 353 F.3d 824, 826 (9th Cir. 2004).

11 Pursuant to Rule 15(a), the court should "freely" give leave to amend "when justice so
12 requires," and in the absence of a reason such as "undue delay, bad faith or dilatory motive on
13 the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,
14 undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the
15 amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

16 **III. DISCUSSION**

17 "Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and
18 'Controversies.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting
19 U.S. Const., art. III, § 2). Standing is a core component of the Article III case or controversy
20 requirement and focuses on whether the action was initiated by the proper plaintiff. *See, e.g.,*
21 *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732–33 (2008). "To establish Article III
22 standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection
23 between the injury and the conduct complained of,' and (3) a 'likelihood' that the injury 'will
24 be redressed by a favorable decision.' *Driehaus*, 134 S. Ct. at 2341 (quoting *Lujan v. Defenders*
25 *of Wildlife*, 504 U.S. 555, 560-61 (1992)).

1 Additionally, “[t]he ripeness doctrine seeks to identify those matters that are premature
2 for judicial review because the injury at issue is speculative, or may never occur.”
3 *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 838 (9th Cir. 2014). “For adjudication
4 of constitutional issues, concrete legal issues, presented in actual cases, not abstractions, are
5 requisite.” *Id.* at 838. It is widely recognized that “the constitutional component [of the
6 ripeness doctrine] overlaps with, and is often indistinguishable from, the ‘injury in fact prong’
7 of [the court’s] standing analysis.” *Id.* at 839.

8 In this case, Defendants’ arguments relating to standing and ripeness ultimately turn
9 upon the same issue—whether the Court may consider Plaintiff’s constitutional challenges
10 despite the fact that no action has yet been initiated against him. When determining if there is a
11 sufficient injury in fact (or sufficient ripeness) for a plaintiff to raise a pre-enforcement
12 challenge, the Court considers: (1) whether the plaintiff articulates a concrete plan to violate the
13 law”; (2) “whether the government has communicated a specific warning or threat to initiate
14 proceedings under the statute”; and (3) “the history of past prosecution or enforcement under
15 the statute.” *Id.* (internal quotations omitted). The Court will address each of these
16 considerations in turn.

17 **A. Concrete Plan to Violate the Law**

18 In asserting a concrete plan to violate the challenged statute, it is not sufficient for a
19 plaintiff to express “a general intent to violate a statute at some unknown date in the future.”
20 *Wolfson v. Brammer*, 616 F.3d 1045, 1059 (9th Cir. 2010). Instead, “the plaintiff must
21 establish a plan that is more than hypothetical.” *Id.* (internal quotations omitted).

22 In this case, Plaintiff has failed to allege a concrete plan to violate any of the provisions
23 at issue. Plaintiff has not expressed that he will refuse to pay the background-investigation fee
24 set forth in Nev. Rev. Stat. § 648.100(2). In fact, by acknowledging that Plaintiff was issued a
25 Nevada private investigator’s license in 2012, the Complaint implies that Plaintiff has already

1 paid the background-investigation fee.¹

2 Plaintiff has also failed to allege a concrete plan to violate Nev. Rev. Stat. § 648.148.
3 Quite the contrary, the Complaint states that Plaintiff has refrained from working as a private
4 investigator in Nevada out of concern that he might violate this requirement by failing to
5 maintain a place of business in Nevada. (Compl. 5:18-20). Therefore, falling well short of
6 establishing a concrete plan to violate Nev. Rev. Stat. § 648.148, Plaintiff has failed to allege
7 even a hypothetical plan to violate this provision.

8 Similarly, Plaintiff has failed to set forth a concrete plan to violate Nev. Rev. Stat. §
9 648.060. Plaintiff makes clear that, despite his wishes, he does not intend to work as a private
10 investigator in Nevada while the challenged provisions are in place. Furthermore, even if he
11 began such work in the near future, the Complaint does not allege that Plaintiff lacks a Nevada
12 private investigator's license. Indeed, the allegations in the Complaint indicate that Plaintiff
13 was issued a license in 2012, (Compl 6:16-17), and there is no indication that his license has
14 expired or been invalidated. Therefore, as the Complaint implies that Plaintiff is properly
15 licensed in Nevada, he has failed to establish a concrete plan to work as a private investigator
16 without a license.

17 **B. Specific Warning or Threat to Initiate Proceedings**

18 Plaintiff has also failed to demonstrate that Defendants have communicated a specific
19 warning or threat to initiate proceedings under the challenged provisions. In regard to Nev.
20 Rev. Stat. § 648.100(2), it would be rather confounding for the Defendants to threaten an
21 action, as it appears that Plaintiff has already paid the required fee. Nevertheless, Plaintiff has
22 failed to allege that there has been any implication that action will be taken against him based
23 on this provision.

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25 ¹ Furthermore, the Complaint is devoid of any implication that Plaintiff was forced to pay in excess of \$1,500
due to his status as an out-of-state applicant. Therefore the Plaintiff has failed to allege that he suffered an injury
in fact as a result of the disparity in the provision.

1 Plaintiff has also failed to allege that there has been a specific threat to enforce Nev.
2 Rev. Stat. § 648.148 against him. Instead, the fact that Plaintiff was issued a Nevada private
3 investigator's license in 2012 despite his lacking a place of business in the state weighs against
4 the notion that Defendants are inclined to initiate proceedings against him.

5 A more lenient standard applies under this prong to Plaintiff's challenges against Nev.
6 Rev. Stat. § 648.060. In pre-enforcement actions alleging a violation of an individual's First
7 Amendment right to free speech, a plaintiff "need only demonstrate that a threat of potential
8 enforcement will cause him to self-censor, and not follow through with his concrete plan to
9 engage in protected conduct." *Bowen*, 752 F.3d at 839. However, the Court does not reach the
10 question as to whether Plaintiff has satisfied this standard, as he has failed to satisfy the other
11 prongs of the injury-in-fact analysis.

12 **C. History of Prosecution or Enforcement**

13 Plaintiff has also failed to establish any history of prosecution or enforcement under
14 Nev. Rev. Stat. §§ 648.100(2) and 648.148. Plaintiff points to no past instances in which
15 proceedings were raised against a private investigator in Nevada for failure to pay a full
16 background investigation fee or failing to maintain a place of business. As for his challenge
17 against Nev. Rev. Stat. § 648.060, Plaintiff cites a case in which legal action was taken against
18 unlicensed individuals suspected of performing work as private investigators, *State v.*
19 *Tatalovich*, 309 P.3d 43 (Nev. 2013); however Plaintiff does not refer to any cases in which an
20 action was raised pursuant to this provision against an individual who possessed a valid Nevada
21 private investigator's license. Because Plaintiff has not alleged that he does not possess a valid
22 license, *Tatalovich* is inapposite to the instant case. Accordingly, the Court finds that Plaintiff
23 has failed to show that any of these provisions has a history of prosecution or enforcement that
24 satisfies the final prong of the injury-in-fact analysis.

25 Accordingly, the Court finds that Plaintiff has failed to establish a concrete plan to

1 violate the challenged provisions and show that there is a history of these provisions being
2 enforced against similarly situated individuals. Furthermore, Plaintiff has failed to demonstrate
3 that there has been a specific threat or warning that Defendants will initiate proceedings against
4 him pursuant to Nev. Rev. Stat. §§ 648.100(2) or 648.148. Therefore Plaintiff lacks standing to
5 raise the instant action, and the Court will grant the Defendants' Motion to Dismiss. Because
6 Plaintiff may be able to cure the deficiencies identified herein, the Court will dismiss the
7 Complaint without prejudice.

8 **IV. CONCLUSION**

9 **IT IS HEREBY ORDERED** that the Motion to Dismiss (ECF No. 21) is **GRANTED**.

10 **IT IS FURTHER ORDERED** that the Complaint (ECF No. 1) is **DISMISSED**
11 **without prejudice.**

12 **IT IS FURTHER ORDERED** that Plaintiff shall have until **February 25, 2015**, to file
13 an Amended Complaint in this action. Failure to file by this deadline will result in **dismissal**
14 **with prejudice.**

15 **DATED** this 5th day of February, 2015.

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19 Gloria M. Navarro, Chief Judge
20 United States District Court
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